

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:

DAVID S. CHASE,
Respondent

Docket No. MPC 15-0203, et al.

**DECISION ON RESPONDENT'S MOTION
TO REINSTATE LICENSE AND DISMISS
SUPERCEDING SPECIFICATION OF CHARGES**

BACKGROUND

By Motion for Summary Suspension dated 7/20/03, the Vermont Attorney General's Office requested that the Vermont Board of Medical Practice (Board) suspend Respondent's license to practice medicine. Effective 7/21/03, the Board ordered the summary suspension of Respondent's license. Subsequent to that order, the Attorney General's Office filed an initial Specification of Charges; and later, Superceding Specification of Charges dated 12/1/03 were filed.

Respondent has filed a Motion to Reinstate License and Dismiss Superceding Specification of Charges. The motion is dated 2/17/04. The State filed a Memorandum in Opposition dated 3/1/04. Respondent filed a Reply Memorandum dated 3/5/04. On 3/25/04, the hearing on the motion was held. Prior to the hearing on the motion, the parties agreed that no evidence would be introduced at the hearing; rather, only arguments of counsel would be presented. For that reason, for purposes of deciding the motion, the Board considered only the documents and accompanying material filed by the parties in relation to the motion.

The Board Hearing Panel included James D. Cahill, M.D.; Patricia A. King, M.D., Ph.D.; Sharon L. Nicol, Public Member; Katherine M. Ready, Public Member; Toby Sadkin, M.D.; and John B. Webber, Esq., Public Member. Phillip J. Cykon, Esq. served as Presiding Officer for the Board. Joseph L. Winn, Esq. appeared on behalf of the State of Vermont. Eric S. Miller, Esq. and R. Jeffrey Behm, Esq. appeared on behalf of Respondent, David S. Chase, M.D., who was present at the hearing.

DECISION

Respondent's motion requests two specific and different actions from the Board: (1) to reinstate his license, and (2) to dismiss the superceding specification of charges against him. As grounds for these requests, Respondent contends that an affidavit the State used in support of its Motion for Summary Suspension was obtained under false pretenses and contained false or inaccurate statements. Respondent asserts that reliance on this affidavit to summarily suspend his license denied him due process. Respondent further contends that letters dated 12/4/03 and 12/18/03 sent by the State to several witnesses have interfered with his ability to interview those witnesses, and that this interference and the questionable summary suspension have combined to deny him his due process right to the opportunity to a fair hearing. The Board addresses the Respondent's requests in reverse order.

MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

Respondent contends that the questionable affidavit in combination with the State's letters to several witnesses have deprived Respondent of his right to a fair hearing on the Superceding Specification of Charges filed against him. Under 26 V.S.A. § 1353, the Board has the authority "to investigate all complaints and charges of unprofessional conduct against any holder of a license or any medical practitioner ... and to hold hearings to determine whether such charges are substantiated or unsubstantiated." See also 26 V.S.A. §§ 1355 and 1360. Board Rule 16.1 sets forth that such disciplinary hearings shall be conducted according to the Vermont Administrative Procedure Act (VAPA), 3 V.S.A. § 809-815. The rights provided under VAPA and the preponderance of evidence burden of proof placed on the State comply with "the constitutional process due" to the Respondent. In re Smith, 169 Vt. 162, 172 (1999).

The Board feels that there is not a sufficient connection between the questionable affidavit and the allegations set forth in the Superceding Specification of Charges to warrant dismissal, since numerous additional charges have been alleged that are completely independent from the allegations appearing in the affidavit. As to the letters to the several witnesses, the evidence at this stage of the proceedings does not establish that Respondent's due process right to a fair opportunity to be heard on the Superceding Specification of Charges has been compromised. Respondent still has the opportunity to afford himself of any investigation and discovery rights that are available to him in an administrative proceeding. He is free to do further interviews, conduct depositions, and, if necessary, utilize the statutory subpoena process set forth in 3 V.S.A. § 809a. At the administrative hearing, Respondent will have full opportunity to call witnesses, present evidence, and present argument on all issues in this matter. 3 V.S.A. § 809(c). He will have the opportunity to cross-examine all witnesses presented against him. 3 V.S.A. § 810(3).

The Board is mindful of the Vermont Supreme Court's view of witnesses in relation to the situation at hand. Compare State v. Messier, 146 Vt. 145, 155 (1985) (in reference to V.R.Cr.P. 16.2, the rule is in accord with the principle that witnesses in a criminal trial are the property of neither the state nor the defendant); Schmitt v. Lalancette, 2003 VT 24, ¶ 13 (counsel for all parties have a right to interview an adverse party's witnesses, the witness willing, in private, without the presence or consent of opposing counsel). Based on this viewpoint, any prospective witness in this proceeding may speak with the attorneys that represent Respondent if the witness so desires, and the Respondent's attorneys can continue to pursue such interviews, discussing with the witnesses the viewpoint expressed in this written decision from the Board.

For these reasons, the request to dismiss the entire Superceding Specification of Charges at this stage of the proceedings on the grounds of the affidavit and the letters is premature and unanimously DENIED. Standing alone, or in combination, the affidavit and the letters do not establish that Respondent's due process right to a fair opportunity to be heard on the Charges has been denied.

MOTION TO REINSTATE LICENSE

Respondent also raises the situation of the questionable affidavit as grounds for the Board to lift the summary suspension previously ordered and to reinstate his license. Respondent contends that the affidavit the State used in support of its Motion for Summary Suspension was obtained under false pretenses and contained false or inaccurate statements. Respondent asserts that reliance on this affidavit to summarily suspend his license denied him due process.

If the questionable portions of the affidavit were to be disregarded, the remainder of the witnesses' factual statement, along with the unchallenged facts from the original complainant and the facts from the physician who provided the second opinion, would seem to provide sufficient grounds to warrant a summary suspension.

The Board's regulatory authority over physicians is "... solely for the purpose of protecting the public." 26 V.S.A. § 3101; Perry v. Medical Practice Bd., 169 Vt. 399, 403 (1999). Part of the Board's responsibility in accomplishing its duty of public protection, is to ensure that its procedures are carried out without even the appearance of questionable standards, and its actions have the complete faith and confidence of the public as well as the individuals who come before the Board.

After careful review and deliberation of the facts before it at this stage of the proceedings, and the issues raised by Respondent concerning the affidavit and the summary suspension order, a majority of the Board is not satisfied that the summary suspension order is completely free from the appearance of the reliance on questionable material, even if partial. For that reason, a majority of the Board (4-2) feels that the summary suspension order should be lifted and that Respondent's Motion to Reinstate License is GRANTED. The two Board members voting not to grant reinstatement are also adamant that board actions must be completely free from even the appearance of reliance on questionable material. However, they believe that the balance of the unchallenged facts presented to support the summary suspension indeed provided sufficient grounds upon which to order the suspension; thus, it should stand.

As stated above, the Board does not believe the questionable portions of the affidavit or the summary suspension order has in any way tainted the Superceding Specification of Charges. The Board, mindful of the Respondent's due process right to a fair opportunity to be heard concerning these charges and the public's interest in a timely resolution of the matter, is therefore prepared to schedule hearing dates as soon as practicable. The Board requests that the parties inform the Board's administrative staff as to the earliest dates the parties are available for hearing.

SO ORDERED.

FOR THE BOARD OF MEDICAL PRACTICE:


James D. Cahill, M.D., Vice-Chairman

3/31/04
Date